SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. 73-1278

CLIFTON C. TANG, Petitioner,

v.

APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, FIRST DEPARTMENT, and Honorable Justices ARON STEUER, OWEN McGIVERN, and LOUIS J. CAPOZZOLI, Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

CLIFTON C. TANG,

A member of the Bar of this Court,
Petitioner pro se,

228 East Clinton Avenue,
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07670

February 1974

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The petitioner, Clifton C. Tang, respectfully prays that a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 19, 1973, and subsisting questions.

OPINIONS BELOW

The opinion of the court below is reported at 487 F.2d 138 (2d Cir. 1973). It is reproduced in Appendix D, infra.

The opinion of the single-judge district court is not reported. It is set forth in Appendix C, infra.

The underlying decision of respondent Appellate Division, denying petitioner admission to the New York bar, is reported at 39 App.Div.2d 357, 333 N.Y.S.2d 964. It is reproduced in Appendix B, infra.

JURISDICTION

The judgment appealed from was entered on October 19, 1973 in the Court of Appeals for the Second Circuit. The timely petition for rehearing in banc was denied on November 30, 1973.

This petition for a writ of certiorari is filed within 90 days of the denial of rehearing below.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the now quashed civil rights claims, which arose out of respondents' construction of bar-admission residency requirement exceeding the limits laid down in Schware v. Board of Bar Examiners, 353 U.S. 232, 239, should be heard and settled by this Court because such construction abridges present and future bar-applicants', and their spouses', freedom to choose (A) permanent residence and (B) place to make home.

2. Whether the court below has so far sanctioned the single district judge's departure from the accepted and usual three-judge court procedure, followed in similar cases such as: Law Students Civil Rights Research Council, Inc., Keenan, Webster, Potts, Suffling, Rose, and Titus, adverse to district courts' statutory jurisdiction and this Court's appellate jurisdiction therefrom, as to call for this Court's supervision.

3. Whether the holding below, that the federal district court lacked jurisdiction to scrutinize the Constitutionality of respondents' construction of bar-admission residency requirement, conflicts with this Court's intervening decision in Titus v. Supreme Court of Virginia, 359 F.Supp. 549, affirmed U.S. , Case No. 73-415 (November 19, 1973), 38 L.Ed.2d 327.

STATUTES AND RULES

Pertinent text of the following statutes and rules involved are set forth in Appendix E in the order of evolving events in this case.

United States	At Page
42 U.S.C. Section 1983	5e
28 U.S.C. Section 1343(3)	5e
28 U.S.C. Section 2281	6e
28 U.S.C. Section 1253	6e

New York State

CPLR stands for Civil Practice Law and Rules of New York.

NYCRR stands for the Official Compilation of Codes, Rules, and Regulations of the State of New York.

CPLR Rule 9404	4e
CPLR Rule 9406	4e
CPLR Rule 9407	5e
Judiciary Law Section 90	3e
Judiciary Law Section 464	3e
Judiciary Law Section 470	2e
22 NYCRR Section 520.1(a)	1e
22 NYCRR Section 520.2(a)	1e
22 NYCRR Section 520.2(b)	2e

STATEMENT OF THE CASE

In this 42 U.S.C. Section 1983 action, jurisdiction of the district court is invoked under 28 U.S.C. Sections 1343(3), 2281, 2284, 2201, and 2202 for injunctive and other relief. The action challenges the constitutionality of New York's bar-admission residency requirement, applied by respondent Appellate Division. Other requirements of the same statute were challenged and settled by this Court[1].

Bar-Admission Administration

A person can be admitted to the New York bar only upon an order of the Appellate Division of the Supreme Court. 22 NYCRR Section 520.1 (App. 1e). The Appellate Division alone admits applicants to the bar and this power rests exclusively[2] with it. Erdmann v.

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1. Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F.Supp. 117, affirmed 401 U.S. 154. At 161, this Court remarked the absence, there, of citizenship and residency issues. The citizenship issue was settled in In Re Griffiths, U.S. , Case No. 71-1336 (June 25, 1973), 37 L.Ed.2d 910.

2. The Appellate Division's disciplinary power is also exclusive but it "holds a trial de novo before any disciplinary action may be taken." Erdmann, at 1209. Whereas, "the appellate division ***, if it shall be satisfied ***, shall admit him to practice ***." Judiciary Law Section 90 (App. 3e).

Stevens, 458 F.2d 1205, 1208-1209 (2d Cir.) cert. denied 409 U.S. 889.

Most persons must take and pass a bar examination and then be certified by the Board of Law Examiners to the Appellate Division. The Board determines, in accordance with Judiciary Law Section 464 (App. 3e), that the candidate, inter alia, has complied with the "actual residence" requirements of 22 NYCRR Section 520.2(b) (App. 2e).

The Board-certified candidate then submits his application, with supporting papers, to the Appellate Division which refers the matter to its Committee on Character and Fitness (Committee)[3] for investigation. CPLR Rule 9404 (App. 4e) After investigation, the Committee certifies the candidate's character, fitness and his continuance of actual residence in New York "until the final disposition of the application." CPLR Rule 9406(3) (App. 4e). "Final disposition of the application" is by the Appellate Division. CPLR Rule 9407 (App. 5e). The Appellate Division may or may not accept the recommendation of its Committee on candidate's admissibility. See for example: Application of Cassidy, 268 App. Div. 282, 51 N.Y.S.2d 202, affirmed 296 N.Y. 926, 73 N.E.2d 41. And, CPLR Rule

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3. The Committee is an advisory arm of the Appellate Division. Association for the Preservation of Freedom of Choice v. Wadmond, 215 F.Supp. 648, 650.

9404 expressly empowers the Appellate Division to admit a candidate to the bar without a certificate from its Committee.

Prior Authority on "Actual Residence"

In Application of Horwitz, 276 App. Div. 918, 94 N.Y.S.2d 490, 491 (1950), a bar-applicant from Brooklyn (N.Y.) was not admitted because he had not "actually resided in this State for six months" as required. The Appellate Division said: "Actual residence means an abode where one actually lives, and not a mere naked legal residence."

In Application of Scharf, 279 App. Div. 919, 110 N.Y.S.2d 920 (1952), a native of Queens, N.Y. was denied bar-admission because, during the requisite six months period he actually, though temporarily, sojourned in Maryland where he served a term of judicial clerkship. During that period, he maintained and returned to his New York apartment from time to time.

Residence After Bar-Admission

CPLR Rule 9406(3) (App. 4e) requires the continuance of "actual residence" in New York only "until the final disposition of the application." After bar-admission, attorneys having law offices in New York are expressly authorized by Judiciary Law 470 (App. 2e) to reside in an adjoining State, such as New Jersey. They need not either (A) intend to reside permanently in New York or (B) make home in New York with their family.

Residence in Compliance and Certification by the Board

For purposes of compliance, relying on the authority of Horwitz and Scharf, supra, in the light of Judiciary Law Section 470 (App. 2e), petitioner commenced actual residence in New York before taking the bar examination without abandoning his permanent residence and family home in New Jersey. Respondent Appellate Division conceded that petitioner's New Jersey residence with his family was not "full time." (App. 1d) And that: "In the case before us, it is not disputed that the applicant since June 1, 1971, has worked, slept and eaten in the state for a substantial portion of that time." (App. 6d)

Petitioner took and passed the New York bar examination held in July 1971. And he was certified by the Board of Law Examiners to the Appellate Division. (App. 1d) He applied to the Appellate Division for bar admission and he was duly referred to the Committee of the Appellate Division. After a personal interview, the vice-chairman of the Committee reported:

> "I have examined the questionnaire and supporting papers of applicant Clifton C. Tang. I find that Mr. Tang possesses the requisite character and fitness for admission to the bar and the only impediment to his admission is the fact that he is a temporary resident and not a permanent resident." (App. 3d)

The Committee withheld certification. (App. 1a) However, the Committee's certification is not indispensable to bar-admission under CPLR Rule 9404. (App. 11d, footnote 1)

Final Disposition of the Application by the Appellate Division

Invoking the Appellate Division's power to admit candidates to the bar without its Committee's certificate, the 9404 petition (App. 1a-7a) was filed. The petition claimed fulfilment of the "actual residence" requirement on the authority of Horwitz and Scharf. (App. 2a-3a) It did not allege any deprivation of Civil Rights under color of state statute. It did not raise those Constitutional questions as capsulized by the district court judge. (See App. 2c and compare with Appendix A.)

Only the chairman of the Committee, alone individually, filed an affidavit. (App. 13d, footnote 3) The Committee has no legal capacity to sue or to be sued. Association for the Preservation of Freedom of Choice, Inc. v. Wadmond, 215 F.Supp. 648, 650. There was no oral hearing. And the Appellate Division did not ask for written briefs and none was submitted by the petitioner, in lieu of oral hearing.

The 9404 petition was denied on two grounds: (A) that petitioner had "no intent of establishing a permanent residence" in New York (App. 2b) and (B) that "one who makes his home elsewhere

is not a resident" of New York (App. 3b). The dissenting opinion concluded:

> "As here applied, the majority decision could well abridge the privileges and immunities to which the applicant, as a citizen of the United States, is entitled." (App. 6b)

Three-Judge District Court Action

The dissenting opinion explicitly stated a 42 U.S.C. Section 1983 cause of action arising out of the Appellate Division's application of the state statute, CPLR Rule 9406.

That statute was the subject matter of Law Students Civil Rights Research Council v. Wadmond, 299 F.Supp. 117, affirmed 401 U.S. 154 (1971). And, in recent years, a number of bar-admission residency requirements have been the subject matter of three-judge court actions. As the court below said: "In fact this is the usual procedure in cases where state admission requirements have been attacked on constitutional grounds." (App. 6d)

Accordingly, and also hoping for speedy injunctive relief, petitioner commenced the district court action below, invoking 28 U.S.C. Sections 1343(3), 2281, etc. (Page 5, supra)

As it turned out, the single judge, on motion before Answer, dismissed the action on the ground that "no substan-

tial federal question is presented which merits the convening of a three-judge court." (App. 2c; App. 1d)

On appeal[4], the court below disowned the district judge's ground for dismissal. The majority said: "appellant's constitutional arguments may well be substantial." (App. 9d) The minority said: "appellant's constitutional claims are not insubstantial." (App. 15d)

The majority affirmed the dismissal result on the ground that "the district court lacks jurisdiction", citing Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) (App. 6d) and res judicata (App. 10d). After a point by point dissent, the minority concludes:

> "I cannot agree that when an applicant for admission to the New York bar is denied by the only body empowered to grant or deny such applications - the Appellate Division - such a denial insulates the challenged rule from constitutional scrutiny in a Section 1983 action." (App. 15d)

Motions for rehearing in banc and for recall of mandate were denied without opinion.

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4. Pursuant to 28 U.S.C. Section 1291 and Idlewild Liquor Corp. v. Epstein, 370 U.S. 713, an appeal was taken to the Court of Appeals for the Second Circuit.

REASONS FOR GRANTING THE WRIT

Summary

A writ of certiorari is now the only process by which the following important questions of federal law can be heard and ruled upon by this Court in one case.

Substantively, novel bar-admission qualifications need be scrutinized against the Constitutional guidelines set forth in Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239. The court below acknowledged the substantialness of the constitutional claims involved. But, it affirmed the dismissal of the action, thus foreclosing a hearing on the merits.

Procedurally, the court below did so by holding that Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) precludes the district courts' 28 U.S.C. Section 1343 jurisdiction (conferred by Congress in 1948) over bar-admission final dispositions made by those exclusively empowered to do so who happen to be judges. This statutory-jurisdiction question need be settled by this Court.

The question, too, of the preclusion of this Court's direct appellate jurisdiction under 28 U.S.C. Section 1253 following the court of appeals' dubiously sanctioning the wrongful dismissal of the three-judge court action by a single district judge - admonished in Stratton v. St. Louis S.W. Ry., 282 U.S. 10, 16 - requires this Court's supervision.

Lastly, on the issue of district court jurisdiction after denial of bar-admission, the conflict of the judgment and mandate[5] below with this Court's intervening decision in Titus v. Supreme Court of Virginia, U.S. , 38 L.Ed. 2d 327, calls for this Court's review.

1. Questions Of Abridgment Of Civil Rights, Substantial But Procedurally Quashed, Should Be Heard And Settled By This Court.

The question of abridgment of civil rights was first voiced by the dissent of respondent Appellate Division (App. 6b) when the majority "applied" the novel construction of "actual residence" to the petitioner.

The novelty stem from two specific sentences of the majority decision:

> "- whether a temporary sojourn with no intent of establishing a permanent residence and merely for the purpose of complying with a possible literal interpretation of the statute suffices." (App. 2b)

and

> "It must be evident that one who

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5. Judgment was entered on October 19, 1973. Motion for recall of mandate, on the ground of Titus, was denied on January 23, 1974.

makes his home elsewhere is not a resident *** " (App. 3b)

Emphasis supplied to pin point the birth place of the following federal civil rights questions, to wit:

A. Whether a State, which authorizes[6] its practicing attorneys to reside in an adjoining State, may exclude an otherwise qualified person from admission to its bar because he undertook actual residence in the State for the requisite period (i) without his wife joining him to make their home in the State, or (ii) "with no intent of establishing a permanent residence" in the State, or both.

B. Whether such a State may exclude such a person, consistent with substantive due process, by declaring retroactive and novel "intent"-and-"home-making" criteria after he undertook "actual residence" in reliance of prior authority, then prevailing in that State[7].

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6. Judiciary Law Section 470. (App. 2e) This law distinguishes New York from New Mexico and Virginia. The bar-admission residency requirements of these latter States have been reviewed by this Court, respectively, in Rose v. Bondurant, 409 U.S. 1020 (1972) and in Titus v. Supreme Court of Virginia, Case No. 73-415 decided November 19, 1973, 38 L.Ed.2d 327.

7. Application of Horwitz and Application of Scharf, see page 7 supra.

C. Whether such a State may abridge the freedoms of bar-applicant's spouse, a U.S. citizen, to choose permanent marital residence and to make their marital home in an adjoining State, by imposing such abridgment restrictions upon the bar-applicant.

These civil rights questions are in sharp focus on the facts of this case which are "undisputed" (App. 2d; see also page 8, supra, and references there to the Appendices.). Petitioner is "an otherwise qualified person" because he was certified by the Board of Law Examiners (App. 1b) after having passed the bar examination (App. 1b) and having complied with the actual residence requirements of the New York Court of Appeals (22 NYCRR Section 520.2(b), App. 2e and Judiciary Law Section 464, App. 3e). And he was duly reported as possessing the requisite character and fitness for admission to the New York bar. (App. 3d) Therefore, this case comes under the direct scrutiny of the proscription laid down in Schware v. Board of Bar Examiners, 353 U.S. 232:

> "A state can require high standards of qualification such as good moral character or proficiency in its laws before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." (Id. at 239)

What is the rational connection between

the bar-applicant's fitness and capacity to practice law and either (i) the place of his marital home or (ii) his "intent" as to his permanent marital residence?

Schware also proscribes:

> "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." (Id. at 238)

Does the ex post facto decision of the Appellate Division, Appendix B, contravene the Fourteenth Amendment as to bar-applicant Tang? As to the spouse of present and future bar-applicants?

Because of the dismissal and the affirmance of the dismissal on different grounds, the substantive civil rights questions have been quashed since August 1972. Meantime, at least one instance of recurrence is published[8]. That case, on appeal to the New York Court of Appeals involving a different set of facts, may or may not reach this Court. But the recurrent nature of the substantive question is certain.

It is respectfully submitted that the quashed civil rights questions should be sooner settled by this Court to minimize recurrence and spread to other states.

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8. Matter of Behrle, New York Law Journal December 12, 1973, p.2; December 13, 1973 p.1.

In In Re Griffiths, U.S. , 37 L.Ed.2d 910, this Court reviewed aliens' right to practice law in this country. It would seem to follow that citizens' right to practice law in a State adjoining their permanent residence or place of home deserves this Court's review as well.

2. This Court's Supervision Is Called For To Settle Questions of Statutory Jurisdictions of Federal Courts.

Respondents were defendants in Law Students Civil Rights Research Council, Inc., supra, wherein other issues of the same statute, CPLR Rule 9406, were litigated in two three-judge court actions and then appealed to this Court.

Bar-admission residency requirements of other States were challenged in three-judge district courts and a few were affirmed by this Court[9].

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9. For example: Keenan v. Board of Law Examiners, 317 F.Supp. 1350 (E.D.N.C. 1970); Webster v. Wofford, 321 F.Supp. 1259 (N.D.Ga. 1970); Potts v. Honorable Justices of Supreme Court of Hawaii, 332 F.Supp. 1392 (1971); Suffling v. Bondurant, 339 F.Supp. 257 (D.N.M. 1972), affirmed sub nom. Rose v. Bondurant, 409 U.S. 1020 (1972); Titus v. Supreme Court of Virginia, sub nom. Brown v. Supreme Court of Virginia, 359 F.Supp. 549 (E.D.Va. 1973), affirmed U.S. , Case No. 73-415 decided November 19, 1973, 34 L.Ed.2d 651.

Therefore, the accepted and usual[10] course of judicial proceedings for litigating over bar-admission requirements has been the convocation of three-judge courts and the exercise of this Court's appellate jurisdiction.

In the action below, the single district judge departed from the usual procedure. He dismissed the action on the ground that "no substantial federal question is presented." His ground was not sustained on appeal. (Page 11, supra) To that extent, the single judge's dismissal was without authority and wrong.

The court below, however, strained to sanction the dismissal. In doing so, the majority invoked res judicata and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). They misconstrued the 9404 petition (Appendix A) "as though it were an appeal of some sort." (App. 12d) They predicated not on the record but on the hypothesis: "he freely sought that forum" (App. 9d) "to raise the constitutional question" (App. 6d).

Prior to the 9404 petition, the authority on the "actual residence" requirement was Horwitz and Scharf (Page 7, supra) Constitutional infirmity only arose out of respondents' decision in which they, for the first time, prescribed two criteria for bar-applicants: (A) an "intent of establishing a permanent residence" in New York (App. 2b)

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10. The opinion below acknowledged this to be "the usual procedure." (App. 6d)

and (B) "one who makes his home elsewhere is not a resident" (App. 3b). The prior definition by Horwitz (Page 7, supra) was: "Actual residence means an abode where one actually lives, and not a mere naked legal residence." Petitioner claimed compliance with the Horwitz requirement in his petition. (App. 2a-3a) Petitioner also relied on Scharf because the fact situation there was the inverse in point. In any event, respondents' criterion (A) was negated in both Horwitz and Scharf, the prior authority in point. As to criterion (B) - place of making one's home - it was unique, unprecedented and novel. With due respect for the two majority judges below, constitutional questions born out of (A) and (B) did not exist when the 9404 petition was filed because respondents authored them.

Next, as to "forum." A person can be admitted to the New York bar only upon an order of the Appellate Division. 22 NYCRR Section 520.1 (App. 1e). On the "still pending application" (App. 12d) at the time when the 9404 petition was filed, "final disposition of the application is done by the Appellate Division under Rule 9407" (App. 12d). This administrative role of the Appellate Division would seem to preclude, under our jurisprudence, its concurrently acting in the role of a disinterested adjudicatory "forum." To pass it off as a "forum" in the usual, adjudicatory sense offends "fairness" of judicial reasoning. Furthermore, "because the petition was the only means to become admitted" (App. 12d), it can hardly be

construed, fairly, that the petitioner "freely sought that (adjudicatory) forum" - as the majority below hypothesized.

There was no oral hearing. Nor, in lieu thereof, an order calling for the submission of written briefs on the merits of the two criteria for "actual residence" (Pages 18-19, supra). Could there have been a bona fide adjudication upon which res judicata and Rooker may be validly predicated?

Rooker v. Fidelity Trust Co., 263 U.S. 413 was decided in 1923 in the context of a bill in equity. The very reason for the result reached was upon consideration of "the district court's jurisdiction as defined by Congress" (Id., at 415) as of that time. The district courts' jurisdiction, here in issue, was conferred by the Act of June 25, 1948, c. 646, 62 Stat. 932, 28 U.S.C. 1343(3), as amended. The reason that determined Rooker would forbid the use of Rooker to strip district courts of specific jurisdiction conferred by Congress subsequent to Rooker. In view of the holding below, a definitve ruling has now become necessary for the guidance of all inferior courts.

On the grounds of res judicata and Rooker, the court below held that the district court lacked jurisdiction and thereby it affirmed the latter's dismissal of the three-judge court action. (App. 6d) Such a procedure undermines this Court's appellate jurisdiction entrusted by 28 U.S.C. Section 1253 and

runs counter to Stratton v. St. Louis S.W. Ry., 282 U.S. 10,16. There, in holding that a three-judge court should have been convened, this Court admonished that it "would defeat the purpose of the statute by substituting a decree by a single judge (acting beyond authority) and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court." Here, the Court of Appeals disowned the single judge's ground for dismissal. Had the single judge not erred at the time, a three-judge court would have been convened. The three-judge court may or may not agree with the application of res judicata and Rooker - as the Court of Appeals did. But in that event, a direct appeal to this Court would have been possible.

Therefore, the disposition below has affected this Court's jurisdiction, per Stratton, as well as district courts' post-Rooker jurisdiction. These jurisdictional questions need be settled by this Court for the guidance of all inferior courts.

3. The Holding Below, That The District Court Lacked Jurisdiction, Conflicts With This Court's Decision In Titus.

The holding below was that the district court lacked jurisdiction. (App. 6d)

After that holding but before the denial of rehearing, this Court affirmed the judgment of the district court in Titus v. Supreme Court of Virginia, 359

F.Supp. 549, affirmed U.S. , Case No. 73-415 (November 19, 1973), 38 L.Ed2d 327. A fortiori, this Court affirmed the jurisdiction exercised in Titus.

Since the Committee's recommendation is not binding upon the Appellate Division (Pages 6-7, supra) and the Committee's certification is not indispensable (App. 11d, footnote 1), "final disposition of the application is done by the Appellate Division under Rule 9407" (App. 12d).

Thus, both applicants, Titus and Tang, were denied bar-admission by the state judicial body exclusively empowered to make that "final disposition." In commencing district court actions, their legal posture was the same, jurisdiction-wise. Therefore, the holding below conflicts with this Court's decision in the Titus case.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the questions presented, on the merits.

Respectfully submitted,

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February 1974

APPENDICES

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APPENDIX A PETITION PURSUANT TO CPLR RULE 9404

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

In the Matter of the Application of

CLIFTON C. TANG

For Admission to the Bar

PETITION

1. The facts leading to this petition are not controverted.

2. Petitioner, CLIFTON C. TANG, having been certified by the New York Board of Law Examiners, duly made an application to this Court for admission to the Bar.

3. The Committee on Character and Fitness of this Court has duly acted upon said application and, according to its Memorandum for File dated May 5, 1972, it has determined that petitioner "possesses the requisite character and fitness for admission to the Bar and that the only impediment to his admission is the fact that he is a temporary resident and not a permanent resident."

4. The Committee is said to be duty-bound, therefore, to withhold certifying petitioner for admission to the Bar.

5. Pursuant to CPLR Rule 9404, this petition seeks an order by this Court which will enable petitioner to be admitted to the Bar.

6. CPLR Rule 9406 publishes the resi-

dency requirement in the following language:

> "...(the applicant) shall furnish satisfactory proof to the effect:
>
> ...
>
> 3. that he has been an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice and that such residence has continued until the final disposition of the application ..."

7. Petitioner has submitted affidavits as proof to the effect that he has been an actual resident of the state of New York for more than 10½ months immediately preceding the submission of his application and that he intends to continue such actual residency until the final disposition of his application.

8. The Committee has noted in the afore said Memorandum for File "the fact that he (petitioner) is a temporary resident" but the Committee has deemed the corollary fact that petitioner is "not a permanent resident" as "the only impediment to his admission."

9. There appears to be no language in Rule 9406 which requires permanent residency as a condition precedent for admission to the Bar or for certification by the Committee therefor.

10. On the other hand, as noted in the Appendix annexed hereto, the case laws on residency requirement appear to be: (1) as in Horwitz, that "actual residence means an abode where one actually

lives, and not a mere naked legal residence" and (2) as in Scharf, that "temporary abode" for "a sojourn in another place" has made the claim by a bona fide New York domiciliary for "actual residency" in New York unsatisfactory for Bar admission purposes. Since a living person must actually live somewhere and if that somewhere is not the place of his permanent residence, then it necessarily follows that the person "actually lives" at his "temporary abode(s)". Thus, on the authority of case laws, for purposes of Rule 9406, petitioner's actual residence has been, and continues to be, in the state of New York.

11. Striving for brevity to this Court, this petition will skirt the issues which might arise from a requirement for permanent residency as a qualification for admission to the Bar. Judicial notice are respectfully requested to be given to those cases bearing upon such issues as cited in the Appendix, namely: Schware, Keenan, Webster, and Potts.

12. For almost one year to date, for the specific purpose of compliance with the "actual" residency requirement for admission to the Bar, petitioner has incurred, and is further incurring, substantial extra living expenses as well as considerable personal hardship in actually living in New York, until the final disposition of his application.

13. Without certification by the Committee, or a Court order pursuant to Rule 9404, petitioner is not permitted by law to practice law in the state of

New York upon the final disposition of his application or at anytime thereafter so long as he remains a permanent resident of a sister state and not of New York.

14. WHEREFORE, petitioner moves this Court for an order authorizing the Committee on Character and Fitness to certify the fact that petitioner is fully qualified for admission to the Bar, or granting petitioner such other and further relief as the Court may deem fair and just.

Respectfully submitted by:

/s/ Clifton C. Tang

CLIFTON C. TANG, Petitioner & Applicant for Admission to the Bar

Appendix (A collection of cases bearing upon this petition)

Actual Residence is Where One Actually Lives.

In Application of Horwitz, 276 A.D. 918, 94 N.Y.S.2d 490 (1950), applicant's domicile was in New York. For a period material to his bar admission, he lived in Massachusetts "actually". Five Justices of the Second Department unanimously decided that his "actual residence" was not where he domiciled but where he actually lived. The court said: "Actual residence means an abode where one actually lives, and not a mere naked legal residence." - apparently referring to the irrelevancy of the naked legal concept of domicile in the

determination of actual residency for bar admission purposes. In this determination, the crucial factor is actuality in fact and not any other legal criterion such as domicile, voter registration, tax payment, etc with respect to which actual place of abode is inconsequential.

Application of Scharf, 279 A.D. 919, 110 N.Y.S.2d 920 (1952) is a similar case with more facts given in the dissenting opinion. Applicant was a domiciliary of Queens County, New York. For a period material to bar admission consideration, his "temporary and enforced abode" was in Maryland. During his so journ there, a vacant, furnished apartment was available to him at the home of his parents. Form time to time, he returned there. On these facts, two Justices would allow his claim for actual residency in New York. But, three Justices ruled otherwise. Since a person must actually live somewhere, for bar admission purposes it necessarily follows that Scharf was an "actual resident" of the place of his temporary abode. Thus, for purposes of Rule 9406, "temporary abode" and "actual residence" are not mutually exclusive in accordance with Scharf.

Residency Requirements and the Constitution.

In recent years, a number of (12 months or shorter) residency requirements, duly promulgated and published in advance by the several states, have been held unconstitutional. The emerging tests appear to be: (1) compelling State in-

terest in the imposition of such residency requirement and (2) rational connection of such requirement with applicant's fitness or capacity to practice law. Four cases bearing upon the constitutionality issue have been noted below.

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). "A State can require high standards of qualification, such as good moral character or proficiency in its laws, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." (at 239) "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." (at 238)

Keenan v. Board of Law Examiners, 317 F.Supp. 1350 (1970). A rule of North Carolina Board of Law Examiners requires 12 months residency prior to the taking of bar examination. The rule was held violative of the Equal Protection Clause because it bears no rational relation to the bar-applicant's fitness or capacity to practice law. (at 1361) In addition it was unconstitutional because it imposes a burden upon the right to interstate travel without being necessary to promote a compelling State interest. (at 1362)

Webster v. Wofford, 321 F.Supp. 1259 (1970) A Georgia statute denies bar-admission to one who otherwise qualifies

but has not resided in Georgia for 12 months prior to admission. The statute was held unconstitutional as violative of the Equal Protection Clause. The court said: "Such (residency) requirement, however, should be imposed only to the extent that they are necessary to protect the State's interest. Onerous restrictions are impermissible."(at 1262)

Potts v. Hon. Justices of the Supreme Court of Hawaii, 332 F.Supp. 1392 (1971) Hawaii statute and Supreme Court rule discriminate against bar-applicants who are not registered voters and who, after age 15, have not resided in Hawaii for 6 months or longer. The law and the rule were held invalid because "the periods of required residency bear no valid relation to the educational and moral qualifications of bar applicants." (at 1398)

APPENDIX B DECISION OF RESPONDENT APPELLATE DIVISION

39 A.D.2d 357

Application of Clifton C. TANG For Admission to the Bar.

Supreme Court, Appellate Division, First Department.
July 6, 1972.

STEUER, Justice:

The motion, brought by an applicant for admission to the Bar, asks that this Court authorize the Committee on Character and Fitness to certify him as qualified for admission. Strictly speaking the relief asked for is unnecessary, the Committee being already authorized to make such a certification whenever in its judgment such action is warranted. What petitioner really wants is a direction to the Committee to the effect that the facts as to his residence do not disqualify him. While it is not the practice of this Court to give directions to the Committee as to how it shall resolve any question before it, the issue itself, involving solely a question of statutory interpretation, is one that will eventually have to be determined by the courts. We therefore address ourselves to it.

Petitioner has passed the bar examination and has been certified by the Board of Law Examiners. His age does not appear on this application but he has been married at least since 1954. In that year, together with his wife, he bought a house in Tenafly, New Jersey, and he, his wife and their two sons have been living there ever since. He concedes that this is his permanent residence. Sometime in June 1971 he rented a room in the Hotel Dixie, 250 West 43rd Street, Manhattan. This was done admittedly to comply with the statutory prescriptions referred to infra. He spends two to four nights a week there, the rest of the time with his family in New Jersey. He intends to continue this practice until he is admitted, when presumably he will resume full time residence in New Jersey.

The statutory residence requirements are found in CPLR Rule 9406 and they are that the applicant be "an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice and that such residence has continued until the final disposition of the application." The phrase "actual resident" does not occur in any other statute of this state although there are many laws in respect to residence. It is therefore reasonable to assume that the legislature had something particular in mind. It is clear that domicile without actual presence in the state (that is, a sojourn elsewhere, the applicant once having resided here intending to return) is not sufficient (Application of Scharf, 279 App.Div. 919, 110 N.Y.S.2d 920); and it has been said that "a mere naked legal residence" is not embraced in the term (Application of Horwitz, 276 App.Div. 918, 94 N.Y.S.2d 490). The question here is not exactly the same—whether a temporary sojourn with no intent of establishing a permanent residence and merely for the purpose of complying with a possible literal interpretation of the statute suffices.

[1] The index to the intended meaning of the unique phraseology is, we believe, best determined by a consideration of what the statute is designed to accomplish. The general purpose of the regulations for admission to the bar of the state is to limit the practice of law to those whom the policy of the state deems eligible to engage in that practice. The residential requirements for practice are therefore illuminating unless it be assumed that the state contemplates admitting to practice those whom it would not allow to practice.

Before an applicant is admitted to practice he must take an oath which, *inter alia*, affirms that he now resides at a specified address in the state (Judiciary Law, § 467) or is a resident of an adjoining state and has an office for practice located within this state. It therefore appears that those entitled to practice are limited to residents of this state and of adjoining states providing they maintain an office here. This has been specifically provided in section 470. Attorneys regularly admitted who subsequently move or fail to maintain an office here lose the right originally acquired (Park Lane Commercial Corp. v. Travelers Ind. Co., 50 Misc.2d 231, 270 N.Y.S.2d 155; Matter of Fordan, 5 Misc.2d 372, 158 N.Y.S.2d 228).

There is an apparent conflict between the residence requirements for practice as to residents of adjoining states and those for admission. On this the legislative history sheds some light. The earliest provision allowing attorneys regularly admitted here but resident in adjoining states to practice in New York was enacted in 1862, and the successor statute of 1866 (ch. 175) has continued, with slight refinements, to the present time. The present Rule, 9406 CPLR, had its origin in what was called Law Rule 1 of the General Rules enacted in 1847, prescribing the methods and conditions for admission to practice. In 1849 General Rule 1 provided that the applicant must be a resident of the judicial district in which he applied. In 1921 Rule 1 was rewritten. The residence requirements, including "actual resident" now in CPLR 9406, are taken from that Rule. It is interesting to note that in the revision of the Rule enacted in 1910 the provision for admission of attorneys who had previously been admitted in another state was amended to allow admission to residents of other, adjoining, states who had opened and maintained an office in this state. The provision is on its face incongruous as it limits the admission of residents of adjoining states to those who prior to admission have opened an office here, and the provision was not continued.

[2] We therefore have this situation—to practice here an attorney must be resident here or a resident of an adjoining state who commutes to his office here. If he does not have such an office he cannot continue to practice here regardless of his prior status. The situation with regard to an applicant who could not possibly have an office here for the practice of law is that he must be a resident. Resident in that connection must mean someone so identified in his base of operations that he is amenable to the supervision of the courts and able to render service to his clients. The legislature has fixed the geographical limits of that base as the borders of this state and, under certain conditions that allow compliance with the over-all purpose, the territory of adjoining states.

It must be evident that one who makes his home elsewhere is not a resident for the very simple reason that he is neither so susceptible to

discipline nor available for service—except in the case of those for whom exception has been provided. There is no point in providing for the admission of those who, though they might comply with the Rule by a construction adverse to its purpose, would nevertheless fall under its ban if they sought to avail themselves of the license to practice. The sense of the requirement of residence is fortified by the words "actual resident".

It may seem in a sense contradictory to allow an attorney resident here who, immediately upon setting out to practice here, moves to New Jersey or Connecticut, to continue to practice law here, while denying the right of a resident of one of those states who intends to practice here. There is however the distinction that the former has established himself here while the other merely has an intent to do so. If there is an anomaly or unfairness resulting it is the province of the legislature to correct it.

The motion is denied.

Motion to qualify for admission to the Bar of the State of New York denied.

All concur except STEVENS, P. J., and TILZER, J., who dissent in a dissenting opinion by STEVENS, P. J.

STEVENS, Presiding Justice (dissenting):

I dissent for the reasons hereinafter stated, and would grant the application.

CPLR 9406 as here applicable provides:

"No person shall receive said certificate [entitling admission] from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect: * * *

"3. that he has been an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice and that such residence has continued *until the final disposition of the application for admission to practice.*" (Emphasis supplied.)

Prescribed requirements for admission to the Bar represent, generally, an exercise of the police power of the state in an effort to provide for the welfare of its citizens and to assure that they will be protected against the ignorant, the inadequately trained and those who would exploit rather than serve their interests. Reasonable and extensive effort is made to insure that the applicant is of good moral character.

Looking to the purpose of a residence requirement, an argument might be made that such a requirement affords an opportunity to check on the background of an applicant, to obtain information from and the opinion of those within the State with whom the applicant has associated, or those who have had the chance to observe the applicant over a period of time. Obviously a residence requirement serves no governmental purpose and if it is to be justified the requirement must be reasonable in application and warranted in duration.

The fact that New York's requirement applies to the six months preceding the submission of the application and continues only "until the final disposition of the application for admission to practice", makes clear that New York does not impose actual residency as a condition precedent to practice once admission has been obtained. Indeed, it has been stated "[T]he right to practice law is in the nature of a franchise from the state conferred only for merit" (Matter of Co-operative Law Co., 198 N.Y. 479, 483, 92 N.E. 15, 16). Residence neither confers nor detracts from merit assuming ability, integrity, knowledge and legal competence, and the other desirable or essential qualities are present. If the residence requirement serves any compelling state interest, and perhaps it does, such interest is not readily identifiable when applied to extremes.

In the case before us, it is not disputed that the applicant since June 1, 1971 has worked, slept and eaten in the State for a substantial portion of that time. The affidavit of the manager of the hotel where the applicant resides attests to the fact that the applicant has been in continuous residence since June 1, 1971, "averaging more than 3½ weeknights per week, with the exception of the Christmas and New Year holidays." If the fact be established the motive for such residence (i. e., to comply with the statutory requirement) should not control. Knowledge and legal competence would seem to be established by his admission to the New Jersey Bar and his successful passing of the New York examination. His admission in a neighboring state may be taken as some indicia of good character, as is his frankness in dealing openly with the situation now confronting him.

Any requirement must be viewed in relation to the age or period of time in which it operates or is applicable. In this day of speedy transportation, ready mobility, when problems of law in their inception solution transgress the limitations of geographical state borders, to deny the application of Mr. Tang is to refuse to face reality. It could raise a serious question of possible discrimination in favor of a select class, permanent residents, as a protection against competition, and as a restriction upon Mr. Tang's right to move about and compete freely with others in the profession. As here applied the majority decision could well abridge the privileges and immunities to which the applicant, as a citizen of the United States, is entitled. (See, Notes, Residence Requirements for Initial Admission to the Bar: A Compromise Proposal, 56 Cornell Law Review, 831 (1971); Residence Requirements for Admission to the Bar, 36 Albany Law Review 762 (1972).

The application should be granted.

TILZER, J., concurs.

APPENDIX C OPINION OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CLIFTON C. TANG v. APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, FIRST DEPARTMENT, et al.

Endorsement and Order Denying Plaintiff's Motion to Convene a Three-Judge Court and Granting Defendants' Motion to Dismiss
72 Civ. 3063

Plaintiff by this action questions the Constitutionality of New York CPLR 9406 (3), which provides that an applicant for admission to the New York Bar must be an "actual resident of the State for six months immediately preceding the submission of his application for admission to practice and that such residence has continued until the final disposition of the application."

Plaintiff prays for declaratory, injunctive and other relief, alleging jurisdiction of this Court under 28 U.S.C. Sections 1343(3), 2201, 2202, 2281 and 2284, and under the general equity powers of this Court to enforce the Civil Rights Act, 42 U.S.C. Section 1983.

There are no factual issues presented. Plaintiff is a citizen, and a member of the New Jersey Bar and of the Bar of the United States District Court for the District of New Jersey. Prior to 1954, his marital domicile was in New York City; since 1954, it has been in Tenafly, New Jersey. He does state, however,

he "has actually lived regularly in Manhattan, his place of abode in New York, since June 1, 1971." If he claims residence therefor (sic) six months, he is at liberty to present evidence of that to the Appellate Division, First Department, Supreme Court; he has not done so.

Plaintiff has moved to convene a three-Judge Court, pursuant to Title 28 U.S.C. Section 2281 and Section 2284, to decide the Constitutionality of New York CPLR 9406(3), alleging that the requirement deprives him of the "personal liberty to follow the calling of one's choice"; and invokes Constitional questions of "Privileges and Immunities, Substantive Due Process, Equal Protection, Freedom to Travel and Freedom to Choose Domicile."

Defendants move to dismiss the complaint for legal insufficiency under Rule 12(b) of the Federal Rules by reason of lack of jurisdiction over the subject matter; and by reason of the fact that the defendant APPELLATE DIVISION is not a "person" within the meaning of Title 42 U.S.C. Section 1983.

I have considered defendants' motion first and have concluded that no substantial federal question is presented which merits the convening of a three-Judge Court.

The requirement that applicants for admission to the Bar be "actual residents" is a reasonable classification

and is designed to serve the compelling state interest to prevent misconduct by itinerant or non-resident practioners in their relations with clients or litigants in the New York Courts.

I have concluded that the complaint should be dismissed for lack of sufficiency and jurisdiction.

It is settled that the right to exercise certain privileges within a State may be conditioned by the State under its police power upon reasonable residence restrictions (Cf. Carrington v. Rash, 380 U.S. 89, 91, 93 (1965). In that case, the power of the State to "impose reasonable residence restrictions on availability of the ballot" was stated to be "unquestioned" (380 U.S., at p.91). Mr. Justice Stewart there stated that:

> "Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence."

That holding made with reference to requirements of bona fide residence in connection with voting rights, is equally applicable to bona fide residence requirement imposed upon an applicant for admission to the bar of a State.

The State of New York may, by rule or law, prevent an applicant for admission from becoming a member of its bar by fraudulently representing that he has become an actual resident of the State (Cf. Matter of Hanafin, 20 N.Y.2d 660

(1967). The State of New York does not prevent residents of other states, or any classification of such persons, from becoming bona fide actual residents of the State's classification. The advisability of its six months' limitation is a subject for legislative, rather than judicial determination.

With reference to its durational requirements, there are considerations which warrant a requirement that a person who is to advise others as to the law of the State and to serve them in a relationship of trust and who intends to exercise the fiduciary powers and functions with which a client may entrust a lawyer, show, by a reasonable period of residence, that he has a fixed and reasonably stable root in the State. The State has a definite interest in assuring potential clients that persons licensed to practice are not transitory peddlers of advice, but are persons whose permanent bona fide residence in the State for the minimum period required by the statute (6 months) offers a measure of certainty that its licensees are not fly-by-nighters (Cf. Dunn v. Blumstein, 31 L.Ed.2d 274 (decided March 21, 1972), which merely involved the residence needed to obtain the right to vote in a state).

One is not licensed to practice law merely because he is a resident and possesses certain legal knowledge. He may be required to demonstrate that he is a person of good moral character. Investigations by "character committees"

and other licensing agencies are not intended to be perfunctory. Durational residence requirements clearly afford investigating agencies a reasonable opportunity and base upon which to predicate their investigations. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Willner v. Comm. on Character & Fitness, 373 U.S. 96 (1963); Webster v. Wofford, 321 F.Supp. 1259 (N.D., Ga. 1970).

In Suffling v. Bondurant, 329 F.Supp. 257 (1972), the six months' residence requirement for admission to the New Mexico Bar was sustained as reasonable; and was held to be sustainable by reason of the State's "compelling interest in the quality and integrity of the persons whom it licenses to practice law." (329 F.Supp. 257, 260)

The mere fact that in petitioner's case the vice chairman of the Character Committee has been able to report favorably on plaintiff's character should have no controlling or persuasive effect here. The question as to how long a period reasonably should be allowed for the Committee's investigation, particularly as to his conduct during his period of residence within the State, is a matter of legislative discretion. That period should be long enough to enable it to uncover the peril-to-the-public situation which it might not be able to uncover during an unreasonably short period of residence.

This federal Court should not interfere

with the Legislature's determination as to the length of residence deemed necessary by the State Legislature for a professional licensee to demonstrate the credentials and character necessary to justify a license to practice law in this State. I conclude that the six months' durational requirement is clearly reasonable. Even in the most comprehensive and rigorous attack upon New York's Bar admission procedures, the reasonableness of the State's residence requirement was not challenged (See Law Students Research Council v. Wadmond, 401 U.S. 154, 158, 161 (1971)).

Plaintiff's motion to convene a three-Judge Court is denied. The complaint herein is dismissed without costs and the Clerk is directed to forthwith enter such judgment.

/s/ Sylvester J. Ryan
U.S.D.J.

Dated: August 30, 1972.

APPENDIX D OPINION OF THE

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 537—September Term 1972.

(Argued March 13, 1973 Decided October 19, 1973.)

Docket No. 72-2222

Clifton C. Tang,

Plaintiff-Appellant,

—against—

Appellate Division of the New York Supreme Court, First Department, and Honorable Justices Aron Steuer, Owen McGivern, and Louis Capozzoli,

Defendants-Appellees.

Before:

Hays, Mulligan and Oakes,

Circuit Judges.

Appeal from a decision of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge*, holding that the requirement of actual residence for applicants seeking admission to the New York Bar (N.Y. CPLR 9406) is reasonable and dismissing plaintiff's claim for a three-judge court as presenting no substantial federal question.

Affirmed.

CLIFTON C. TANG, pro-se, Tenafly, New Jersey, *for Appellant.*

DANIEL M. COHEN, Assistant Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General, Samuel A. Hirshowitz, First Assistant Attorney General of the State of New York, on the brief), *for Appellees.*

MULLIGAN, *Circuit Judge:*

This is an appeal from a judgment of the United States District Court for the Southern District of New York, dismissing plaintiff's action for injunctive and declaratory relief under the Civil Rights Act, 42 U.S.C. § 1983. Plaintiff Tang had moved to convene a three-judge court pursuant to 28 U.S.C. § 2281 and § 2284 to decide the constitutionality of New York CPLR 9406(3),[1] alleging that the requirement of actual residence violated the equal protection clause of the 14th Amendment as well as his constitutionally based right to travel. The District Court found that the plaintiff's complaint did not present a constitutional question sufficiently serious to require the convening of a three-judge court.

The facts in this case are undisputed. Appellant and his wife lived in Tenafly, New Jersey since 1954, with their two

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1 N.Y. C.P.L.R. § 9406 (McKinney Supp. 1972) provides in pertinent part:

> No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:
>
> . . . .
>
> 3. that he has been an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice and that such residence has continued until the final disposition of the application for admission to practice. . . .

children. The appellant concedes that this is his permanent residence. Appellant is a practicing attorney in New Jersey, having been duly admitted to the bar of that state. In 1971 appellant took and passed the New York Bar examination and was certified by the Board of Law Examiners in March, 1972. Thereupon appellant submitted a verified application for admission to the New York Bar, complete with the necessary papers, including proof of actual residence in New York since June 1, 1971. The sole purpose of this temporary residence was to comply with the residence requirement set out in New York CPLR 9406(3). The appellant's residence in New York consisted of a rented room in the Hotel Dixie, 250 West 43rd Street in Manhattan. The appellant spent two to four nights a week there, the rest of the time with his family in New Jersey. Appellant planned to continue this practice until he was admitted to the New York Bar, when he would presumably return to full time residence in New Jersey.

Appellant's application for admission to the bar was denied. The appropriate member of the Committee on Character and Fitness stated:

> "I have examined the questionnaire and supporting papers of applicant Clifton C. Tang. I find that Mr. Tang possesses the requisite character and fitness for admission to the Bar and the only impediment to his admission is the fact that he is a temporary resident and not a permanent resident."

Appellant then petitioned the Appellate Division of the Supreme Court of the State of New York for an order to admit him to the Bar. This petition was denied by a court divided 3 to 2. 39 App. Div. 2d 357, 333 N.Y.S. 2d 964 (1st Dep't 1972). The majority interpreted the "actual residence" requirement of New York CPLR 9406(3) to mean permanent residence, or more accurately, intent to

establish permanent residence. The majority found that plaintiff's 10 month residence in Manhattan was "a temporary sojourn with no intent of establishing a permanent residence," and denied plaintiff's petition. The dissent argued that the majority opinion was discriminatory, "in favor of a select class, permanent residents," and against the class to which the plaintiff belonged, bar applicants who are actual but not permanent residents.

Following the decision of the Appellate Division the appellant brought this action in the District Court for the Southern District of New York which dismissed the complaint.

Since this case was decided by the District Court, the Supreme Court has affirmed *Suffling* v. *Bondurant*, 339 F. Supp. 257 (D. N.M.), aff'd sub nom. *Rose* v. *Bondurant*, 409 U.S. 1020 (1972), upon which the District Court largely relied. However *Suffling* did not decide the constitutional issue presented in this case. In *Suffling*, a three-judge court held that the New Mexico Supreme Court rule requiring six months' residence before admission to the bar did not violate the equal protection clause or the constitutionally based right to travel. The court reasoned that six months was reasonable period for providing the state an opportunity to examine the character and fitness of the applicant. The Supreme Court affirmed without opinion.

The question in the instant case differs from *Suffling* because of the interpretation given to the New York statute by the New York courts, since the Appellate Division interpreted New York CPLR 9406(3) to require *permanent* residence not merely six months' residence. Thus, the New York requirement of actual residence as interpreted by the New York courts is substantially broader than that approved in *Suffling* and affirmed by the Supreme Court. The question remains whether the broader New York residence requirement had a "rational connection with the

applicant's fitness or capacity to practice law." *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239 (1957). We do not reach this issue.

The appellant has conceded on oral argument that in his state proceeding, he raised the same federal constitutional issues which he now relies upon in the federal court in this action under 42 U.S.C. § 1983.[2] See *Grubb* v. *Public Util. Comm'n*, 281 U.S. 470, 477-78 (1930). There is no question but that Tang could have appealed the three-two decision of the Appellate Division to the New York Court of Appeals on the merits (the interpretation to be given "actual residence" in New York CPLR 9406(3)) as well as on the federal constitutional questions.[3] In the event that he was unsuccessful he would have been assured of a direct appeal to the United States Supreme Court.[4] Tang

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2 In his petition to the Appellate Division, Tang requested the court to take judicial notice of *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957); *Potts* v. *Honorable Justices of the Supreme Court of Hawaii*, 332 F. Supp. 1392 (D. Hawaii 1971); *Webster* v. *Wofford*, 321 F. Supp. 1259 (N.D. Ga. 1970); *Keenan* v. *Board of Law Examiners*, 317 F. Supp. 1350 (E.D.N.C. 1970). He also devoted two pages of his three-page brief to the federal constitutional argument. The dissenting opinion referred specifically to the alleged constitutional infirmity of the New York residency requirement. The silence of the majority opinion on the constitutional issue is of course immaterial.

> "The question of the constitutional validity of the order was distinctly presented by the appellant's petition and necessarily was resolved against him by the judgment affirming the order. Omitting to mention that question in the opinion did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it." *Grubb* v. *Public Util. Comm'n*, 281 U.S. 470, 477-78 (1930).

3 N.Y. Const. art. 6, § 3(b); N.Y. C.P.L.R. § 5601, as amended (McKinney Supp. 1972). See, e.g., *In re Anonymous*, 17 N.Y.2d 674, 216 N.E.2d 612, 269 N.Y.S.2d 454 (1966).

State courts are of course competent to adjudicate questions of federal constitutional rights. See *NAACP* v. *Button*, 371 U.S. 415, 427-28 (1963).

4 28 U.S.C. § 1257(2); see R. Stern & E. Gressman, Supreme Court Practice § 3.4 (4th ed. 1969).

however abandoned the state courts after the intermediate ruling of the Appellate Division and is now in effect seeking a review of the constitutional issues in a federal court. The district court lacks jurisdiction to review state court determinations of federal constitutional questions and on that ground we affirm the dismissal of the action. *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923).

There is no doubt that after having been denied admission to the New York bar, Tang could have immediately initiated his § 1983 action in the federal district court. In fact this is the usual procedure in cases where state admission requirements have been attacked on constitutional grounds.[5] Instead he selected the state forum to raise the constitutional question which he had the perfect right to do.[6] However,

> [w]hile the lower federal courts were given certain powers in the 1789 [Judiciary] Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. Only the Supreme Court was authorized to review on direct appeal the decisions of state courts.

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5 E.g., *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 401 U.S. 154 (1971); *Sugling* v. *Bondurant*, 339 F. Supp. 257 (D.N.M.), aff'd sub nom. *Rose* v. *Bondurant*, 409 U.S. 1020 (1972); *Harris* v. *Louisiana State Supreme Court*, 334 F. Supp. 1289, 1297-98 (E.D. La. 1971); *Lipman* v. *Van Zant*, 329 F. Supp. 391 (N.D. Miss. 1971); *Webster* v. *Wofford*, 321 F. Supp. 1259 (N.D. Ga. 1970); *Keenan* v. *Board of Law Examiners*, 317 F. Supp. 1350 (E.D.N.C. 1970).

6 Even if an action is commenced in the federal court and that court abstains, argument of the federal constitutional issues without reservation would constitute an election precluding a return to the federal district court. See *England* v. *Board of Medical Examiners*, 375 U.S. 411, 421 (1964). *A fortiori* where the state action is prior in time and the constitutional argument has been made in that court, there is no jurisdiction in the district court to reverse the judgment of the state court which is the relief sought here. The additional prayer for declaratory and injunctive relief cannot salvage an otherwise defective complaint and confer jurisdiction where none exists.

> Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in [the Supreme] Court of the federal questions raised in either system. *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970).

The fact that Tang brought his action under § 1983 does not alter the *Rooker* principle.[7] Thus in *Anderson* v. *Lecon Properties, Inc.*, 457 F.2d 929 (8th Cir.), cert. denied, 409 U.S. 879 (1972), the plaintiffs had started a state action in which they initially were successful, but were eventually subject to a writ of mandamus issued by the Minnesota Supreme Court ordering the trial court to vacate its judgment in plaintiffs' favor. They thereupon instituted a § 1983 action in the federal district court alleging that the Supreme Court of Minnesota had *inter alia* violated their federal constitutional rights of due process and equal protection under the Fourteenth Amendment. In affirming the district court's dismissal of the complaint, the court stated:

> To the extent that there was any error of constitutional magnitude in the Minnesota Supreme Court's decision, plaintiffs' sole recourse was to the Supreme Court of the United States. Federal courts of inferior jurisdiction have no jurisdiction to review alleged errors in state court judgments. Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); Evanson v. Northwest Holding Company, 368 F.2d 531 (8th Cir. 1966).

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7 Jurisdiction to review in habeas corpus proceedings is not barred by prior state adjudication since the habeas applicant must have first "exhausted the remedies available in the courts of the State . . ." 28 U.S.C. § 2254(b).

457 F.2d at 930. This position has also been adopted in *Paul* v. *Dade County*, 419 F.2d 10 (5th Cir. 1969), cert. denied, 397 U.S. 1065 (1970); *Brown* v. *Chastain*, 416 F.2d 1012 (5th Cir. 1969), cert. denied, 397 U.S. 951 (1970).

There is authority in this circuit, *Katz* v. *Connecticut*, 433 F.2d 878 (1970); *Taylor* v. *NYCTA*, 433 F.2d 665 (1970), and elsewhere, *Bricker* v. *Crane*, 468 F.2d 1228 (1st Cir. 1972), cert. denied, 410 U.S. 930 (1973); *P.I. Enterprises, Inc.* v. *Cataldo*, 457 F.2d 1012 (1st Cir. 1972); *Howe* v. *Brouse*, 422 F.2d 347 (8th Cir. 1970); *Dean Hill Country Club, Inc.* v. *City of Knoxville*, 379 F.2d 321 (6th Cir.), cert. denied, 389 U.S. 975 (1967), which squarely holds that a prior state court decision adjudicating federal constitutional questions is binding as *res judicata* in a subsequent federal action under § 1983.[8]

We do not rest our opinion hereon the basis of *res judicata* since the respondent in the state action was the Committee on Character and Fitness of the First Judicial District and in the federal action the appellant has named as defendant the Appellate Division, First Department, as well as the three justices who voted to deny his petition. It is generally understood that the doctrine of *res judicata* is limited to cases where the same parties are again before the court. Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 861-62 (1952). While it is tempting to consider the substitution here a technicality or to employ the related concept of collateral estoppel, we see no purpose in the exercise. The procedure adopted by the appellant accentuates the need here to apply the doctrine of *Rooker* and its progeny. If appellant had simply sued the Contractor Committee in a § 1983 action in the federal

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8 The Supreme Court has not yet ruled on the question, denying certiorari in *Florida State Board of Dentistry* v. *Mack*, 401 U.S. 960 (1971) (dissenting opinion by Mr. Justice White joined by Chief Justice Burger).

court, there is substantial authority that *res judicata* would bar his action. It would seem to follow *a fortiori* that the direct suit against the state judiciary raising the very same issues should be dismissed if the principle of comity is to have any meaning. Not only is the practice bizarre but the affront to the state legal system is blunt and unnecessary. The appellant was not dragged into the state court, he freely sought that forum. See Note, Res Judicata: Exclusive Federal Jurisdiction and the Effect of State-Court Determinations, 53 Va. L.Rev. 1360, 1385 (1967).

There is no question but that the state court had jurisdiction of the person and subject matter here involved. Moreover this Court has been particularly chary of intrusion into the relationship between the state and those who seek license to practice in its courts. See *Erdman* v. *Stevens*, 458 F.2d 1205 (2d Cir.), cert. denied, 409 U.S. 889 (1972). Had appellant perfected his appeal, the New York Court of Appeals may well have reversed on the merits or followed the federal constitutional reservations expressed by Presiding Justice Stevens in his dissenting opinion. The district court here is bound by the Appellate Division's construction of the New York rule and judicial manpower may well be needlessly wasted if the opinion of that court does not in fact represent the law of that state.

While appellant's constitutional arguments may well be substantial and we are sympathetic with the plight of one who has lived in a Times Square Hotel for 10 months all to no avail, the concept of federalism should not be scrapped at the whim of the disgruntled suitor.

Affirmed.

HAYS, *Circuit Judge* (concurring in the result):

I concur in the result on the ground of res judicata.

I do not consider it necessary in order to uphold this result to resort to the vague and uncertain doctrine of "comity."

OAKES, *Circuit Judge* (dissenting):

While both my colleagues apparently concede that *Suffling* v. *Bondurant*, 339 F. Supp. 257 (D. N.M.), *aff'd mem. sub nom. Rose* v. *Bondurant*, 409 U.S. 1020 (1972), does not render appellant's constitutional claim wholly insubstantial, thereby calling for convocation of a three-judge court, both affirm the lower court's decision dismissing the action.

To reach this conclusion my colleagues rely on two different, although basically related, theories, neither of which were briefed or argued before either this or the district court. Judge Mulligan rests his argument on *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), but he also hints at elements of comity. Judge Hays rests his conclusion on res judicata. These theories are related because both allow that if appellant had not filed a petition with the Appellate Division, then his action here would not be dismissed. Both theories advance a notion that appellant had a choice of remedies—either to appeal the Character and Fitness Committee's determination and interpretation through the New York courts or to bring a § 1983 action in Federal court. Each concludes that Mr. Tang elected to proceed through the New York courts by filing a petition with the Appellate Division, and goes on to hold that his only route to federal adjudication of his constitutional claims was by appeal to the Supreme Court from a determination of the New York

Court of Appeals.[1] What both my colleagues miss, however, is that appellant *never* invoked the jurisdiction of the New York courts for any purpose other than to make an application for admission to the bar, and inasmuch as application to the Appellate Division of the Supreme Court is the sole and exclusive manner by which persons may be admitted to the New York bar, *Erdmann* v. *Stevens*, 458 F.2d 1205, 1208-09 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972), making such an application cannot be deemed an election of remedies.

Applications for admission to the New York bar are themselves actions *in* the Appellate Division. To say that its determination denying an applicant's admission cannot be challenged in a § 1983 action because it is res judicata would be to make a wholly unreasonable distinction between (a) those who challenge rules of admission (1) prior even to application, *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 401 U.S. 154 (1971), (2) when denied the opportunity to take the bar examination, *Keenan* v. *Board of Law Examiners*, 317 F. Supp. 1350 (E.D.N.C. 1970), (3) when denied admission to the bar in states where such decisions are made by administrative agencies, *cf. Lipman* v. *Van Zant*, 329 F. Supp. 391 (N.D. Miss. 1971), or (4) when denied certification after passing the bar exam, as suggested by my colleagues[2]—all of whom may bring

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1 Judge Mulligan states, "There is no doubt that after having been denied admission to the New York bar, Tang could have immediately initiated his § 1983 action in the federal district court." Yet the plain facts of this case show that Tang *did* initiate his § 1983 action immediately after being denied admission. This is so because only the Appellate Division has the power to deny admission. The committee only denies certification, but certification is not indispensable to admission to the bar. CPLR Rule 9404.

2 Indeed, had appellant come to federal court after his denial of a certificate by the committee, the State could well have argued that the anti-injunction statute, 28 U.S.C. § 2283, would operate to bar injunctive relief because appellant would still be involved in a proceeding in

§ 1983 challenges—and (b) those who challenge rules of admission when denied admission by the court to which the original application was made—the situation in this case.

My colleagues construe appellant's original petition for admission as though it were an appeal of some sort: Rule 9404 of the CPLR, however, provides that "[u]nless otherwise ordered by the appellate division, no person shall be admitted without a certificate from the proper committee . . . ." Appellant had been denied a certificate from the committee, but his application for admission had not been denied. Indeed, the committee does not grant or deny the application for admission; "final disposition" of the application is done "by the appellate division" under Rule 9407. Mr. Tang's petition to the Appellate Division was, therefore, not an appeal from the committee. *Cf. Konigsberg* v. *State Bar of California*, 353 U.S. 252, 254 (1957). Rather, it was a petition in respect to his still pending application asking for an order under Rule 9404 admitting him *without certification* or in the alternative directing the committee to certify him. Because appellant in petitioning the Appellate Division was merely following the CPLR Rules governing admission to the bar and because the petition was the only means by which to become admitted, appellant should not be considered to have elected to pursue his remedy in the state courts, and be thus precluded from raising his constitutional claim in a federal district court.

Judge Hays states that appellant is foreclosed from raising his constitutional claim in a lower federal court on the ground of res judicata. This cannot be. First, res judicata is an affirmative defense which must be set

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a state court. *See also Chaney* v. *State Bar of California*, 386 F.2d 962, 966 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011 (1968), (alternative ground for denying § 1983 action challenging bar admission requirement —plaintiff had been denied Committee's certification, but only state supreme court had power to deny admission; plaintiff thus was not deprived of any right).

forth in the pleadings. Fed. R. Civ. P. 8(c). Moreover, the failure to plead res judicata as a defense amounts to a waiver of that defense, and it cannot be raised on appeal for the first time. *Badway* v. *United States*, 367 F.2d 22, 25 (1st Cir. 1966). The same is true for collateral estoppel. *Cf. Federal Savings and Loan Insurance Corp.* v. *Szarabajka*, 330 F. Supp. 1202, 1205 (N.D. Ill. 1971). Here defendants-appellees have never pleaded res judicata or even briefed it. To hold against appellant on this basis would frustrate the whole point of Rule 8(c)—to try to prevent surprise to the other party, who in this case has never had an opportunity to brief the point.

More importantly, where the causes of action are different or the parties different, res judicata does not apply and collateral estoppel extends only to those issues actually litigated and decided. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-98 (1948); *Cromwell* v. *County of Sac*, 94 U.S. 351, 353 (1876); 1B Moore, Federal Practice ¶ 0.405[3], at 633 (1973). Here, there is no indication that appellant ever claimed before New York courts that the residency requirement of § 9406 was unconstitutional. Judge Mulligan states that appellant conceded on oral argument that he raised this issue in his state proceeding. My memory may not be so good as my colleague's, but my interpretation of appellant's comments to us and his papers before the Appellate Division in his appendix to the petition is that he merely informed the New York court of the recent United States Supreme Court decisions concerning residency requirements to aid the court in defining "actual" residence. That this was not interpreted as a constitutional attack on the requirement is shown both by the answering affidavit of the chairman of the Committee on Character and Fitness[3] and the complete failure of the

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3 The concluding paragraph of this affidavit filed with the Appellate Division was:

Appellate Division majority to address any constitutional attack, one which was hinted at in the dissenting opinion of the Appellate Division, to be sure, but solely for purposes of a statutory construction argument.

Judge Mulligan cites *Rooker* as the basis for his decision. *Rooker*, however, was an action in equity "to have a judgment . . . declared null and void," 263 U.S. at 414, on the basis of constitutional error. A reading of the case makes clear that the relief there sought was to reverse or modify the actual judgment of the state court. While appellant here does ask for such relief (paragraphs E and F of Complaint), his complaint is not limited to that. He also asks for a declaratory judgment that Rule 9406(3) is unconstitutional and for an injunction restraining appellees from further enforcement of it. These latter claims are not covered by the *Rooker* doctrine, because declaring Rule 9406(3) unconstitutional and granting injunctive relief would not disturb the Appellate Division's earlier decision. Our decision would not make appellant a member of the New York bar.

Judge Mulligan hints at considerations of comity to justify denying federal relief to appellant, and cites *Erdmann* v. *Stevens*, *supra*, as an example of this court's reluctance to intrude "into the relationship between the state and those who ask license to practice in its courts." *Erdmann*, however, dealt only with an attempt to enjoin *disciplinary* proceedings against an already admitted law-

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The sole question thus before the Court is the question as to whether or not residence as used in C.P.L.R. Rule 9406 means permanent residence or domicile, or whether a temporary, and indeed "naked" residence, in the sense of renting a hotel room, is enough to satisfy the intent of the statute.

In *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948), the Court, in considering a defense of res judicata, strongly emphasized that both parties had briefed and argued that issue fully in the lower courts. Appellant here has never been accorded such an opportunity.

yer; this court denied the injunction on the basis of the sextet of cases led by *Younger* v. *Harris*, 401 U.S. 37 (1971). Federal courts have not been unwilling to consider constitutional challenges to state bar *admission* rules and practices, and indeed I find no case where a federal court has dismissed a complaint or affirmed a dismissal on the basis of "comity" in a case challenging a state's bar *admission* practices.[4]

In conclusion, therefore, I believe that the district court has jurisdiction and that appellant's constitutional claims are not insubstantial. I cannot agree that when an application for admission to the New York bar is denied by the only body empowered to grant or deny such applications—the Appellate Division—such a denial insulates the challenged rule from constitutional scrutiny in a §1983 action.

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4 There is dicta in *Erdmann*, 458 F.2d at 1210, which, on its face, would apply equally to disciplinary and admission proceedings. However, then Chief Judge Friendly, writing for a three-judge court in *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 299 F. Supp. 117, 124 (S.D.N.Y. 1969), *aff'd*, 401 U.S. 154 (1971), explicitly rejected a comity-abstention argument in a direct attack on state bar admission procedures. Even application of the doctrine of "comity" in the disciplinary context in *Erdmann* is open to dispute, moreover, in view particularly of the Supreme Court's recent decision in *Gibson* v. *Berryhill*, 411 U.S. 564, 575-77 (1973). *See Polk* v. *State Bar of Texas*, 480 F.2d 998, 1001-02 & n.10 (5th Cir. 1973).

APPENDIX E PERTINENT TEXT OF STATUTES AND RULES (Arranged in the order of evolving events.)

New York State

NYCRR stands for Official Compilation of Codes, Rules, and Regulations of the State of New York.

22 NYCRR Section 520.1 General regulation as to admission. (a) General regulation. A person shall be admitted to practice as an attorney and counsellor at law in any court of the State only upon an order of the Appellate Division of the Supreme Court admitting him to the bar and licensing him to practice upon compliance with these rules.

22 NYCRR Section 520.2 Admission upon examination. (a) Proof required by State Board of Law Examiners. An applicant for admission to the bar examination shall furnish to the State Board of Law Examiners proof satisfactory to said board. *** (4)(i) that he is an actual resident of the State of New York, or (ii) that he intends in good faith to establish actual residence in this State before the date fixed for the examination and to maintain such actual residence for at least six months prior to applying for admission to the bar of this State; provided that an applicant admitted to the examination pursuant to this paragraph shall not be certified to the Appellate Division of the appropriate department by the Board of Law Examiners or admitted to the bar

until he has furnished proof of actual residence in the State of New York at the time of the bar examination and continuance of such residence for a period of six months subsequent to its establishment; *** .

(b) Proof of residence for certification. An applicant admitted to the examination pursuant to subparagraph (a)(4)(i) or subparagraph (a)(4)(ii) of this section shall not be certified to the Appellate Division of the appropriate department by the State Board of Law Examiners or admitted to the bar until he has furnished proof of actual residence in the State of New York at the time of the bar examination and continuance of such residence for a period of six months subsequent to its establishment.

(22 NYCRR Section 520 et seq. are rules of the New York Court of Appeals promulgated under authority of Judiciary Law Section 53. For admission to the bar without examination in the discretion of the Appellate Division, "not less than six months" actual residency is required under 22 NYCRR Section 527.1(d).)

Judiciary Law Section 470 Attorneys having offices in this state may reside in adjoining state. A person regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney Or counsellor, although he resides in an adjoining state.

Judiciary Law Section 464 Certification by state board of successful candidates. Every person who shall pass the examination, *** , shall be certified by the state board of law examiners to the appellate division of the supreme court of the department in which such person actually resided at the time of application for admission to such examination, *** , provided such person shall have in other respects complied with the rules regulating admission to practice as attorneys and counsellors, which fact shall be determined by said board before certification.

Judiciary Law Section 90 Admission to and removal from practice by appellate division; character committees. 1.a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

CPLR stands for Civil Practice Law and Rules of New York State.

CPLR Rule 9404 Certificate of character and fitness. Unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission. To enable the committee to make such investigation the committee, subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionaire on which the applicant shall set forth all the information and data required by the committee and the appellate division justices, including specifically his residence as may be required by the committee and the appellate division, listing the street and number, if any, and the period of time he resided at each place.

CPLR Rule 9406 Proof. No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counsellor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect: ***
3. that he has been an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice and that such residence has continued until the final disposition of the application for admission to practice; *** .

CPLR Rule 9407 Filing. Every application for admission to practice, together with all the papers submitted thereon, upon its final disposition by the appellate division shall be filed in the office of the clerk of such appellate division.

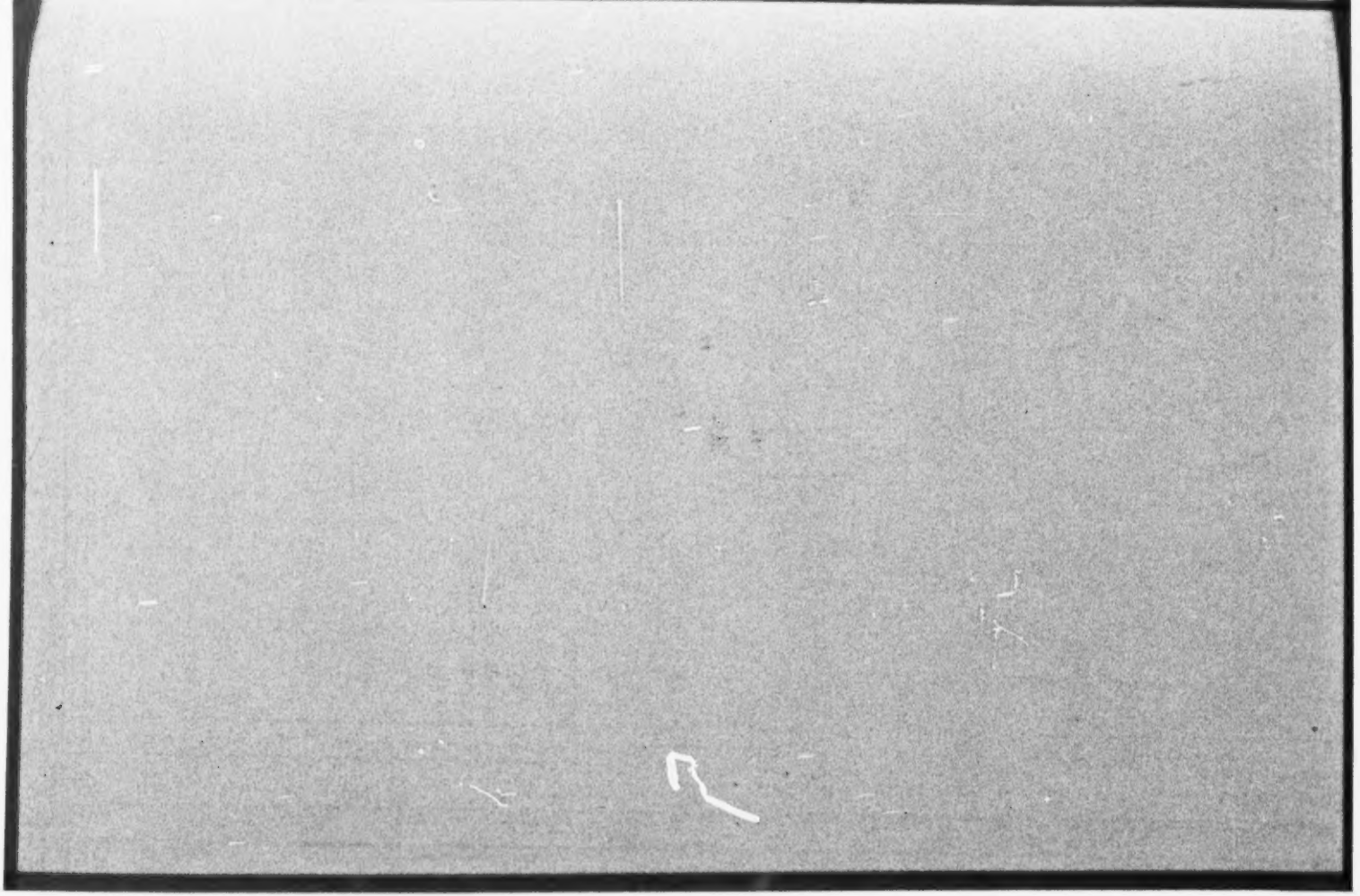
United States

42 U.S.C. Section 1983 Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privilege, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. Section 1343 Civil rights and elective franchise. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: ***
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; *** .

28 U.S.C. Section 2281 Injunction against enforcement of state statute; three-judge court required. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. Section 1253 Direct appeals from decisions of three-judge courts. Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.



Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1278

CLIFTON C. TANG,

Petitioner,

against

APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, FIRST DEPARTMENT, and Honorable Justices ARON STEUER, OWEN MCGIVERN, and LOUIS J. CAPOZZOLI,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner (a New Jersey attorney whose application for admission to the New York bar was denied on July 6, 1972 by a divided Appellate Division of the Supreme Court, First Judicial Department on the ground that he had not satisfied New York's six month "actual residence" requirement and who chose not to exercise his right of appeal to the New York Court of Appeals from that denial) seeks certiorari to review an October, 1973 judgment of the United States Court of Appeals for the Second Circuit, which affirmed an order of the United States District Court for the Southern District of New York denying his application to convene a three-judge Court and its judgment dismissing his complaint herein.

Jurisdiction

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Appeals judgment which he seeks to review by a February, 1974 petition was entered on October 19, 1973, but we shall assume that his time to petition was extended by his petition for rehearing which was denied on November 30, 1973.* See *Gypsy Oil Co.* v. *Escoe,* 275 U.S. 498 (1927).

Question Presented

Since this Court, in *Rose* v. *Bondurant,* 409 U.S. 1020 (1972) sustained a New Mexico requirement that an applicant for bar admission be an actual resident of that State for six months prior to admission, the sole question presented upon this record is whether this Court should deem it appropriate or necessary to review the constitutionality of the New York requirement that an applicant

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* In that rehearing application he had repeated a "suggestion for a hearing *en banc*" which had been denied before argument by Chief Judge Henry J. Friendly on January 24, 1973.

The petitioner had also sought to exploit federal procedure by having the Second Circuit direct a "prehearing conference" pursuant to Rule 33 Federal Rules of Appellate Procedure. That motion had been denied on March 9, 1973 by the Second Circuit.

Despite the fact that the November 30, 1973 order denying rehearing recited that "no active judge or judge who was a member of the panel" had requested that a vote be taken on petitioner's "suggestion" that the "action be reheared *en banc*", petitioner moved further on January 15, 1974 to recall the mandate of the Court of Appeals. On January 23, 1974, that Court complied with petitioner's request to take judicial notice of *Titus* v. *Supreme Court of Virginia,* 359 F. Supp. 549 (E.D. Va. 1973), affd. 42 U.S.L.W. 3301 (Nov. 20, 1973) (No. 415) and *Americ. Trial Lawyers Ass'n.* v. *New Jersey Supreme Court,* 409 U.S. 467 (1973), but adhered to its prior order "denying *en banc* consideration" and denied petitioners "motion dated January 15, 1974 to recall the mandate".

for admission to its bar be an actual resident of New York for six months prior to admission.

In deciding that question, it should be noted that the New York Court of Appeals, which petitioner chose to avoid, presently has pending before it two cases in which the construction and validity of the New York requirement are being challenged. *Matter of Lotsof* (No. 1973-663); and *Matter of Behrle* (No. 1974-86). It should also be observed that the petitioner, although he had failed to perfect any appeal to the New York Court of Appeals, has, after filing this petition for certiorari, now requested that Court's permission to file an *amicus* brief in the *Behrle* appeal (Motion for Leave, dated February 28, 1974; Appendix A, annexed hereto).

Under these circumstances, it is unnecessary for this Court to reach the federal questions which petitioner seeks to present here as to whether a three-judge Court should have been convened in this action, particularly since a three-judge Court of Appeals later considered his contentions; and as to whether that Court of Appeals correctly refused on grounds of *res judicata* or comity to review the judgment of the New York Appellate Division upon the federal constitutional questions which petitioner had allegedly presented to the Appellate Division.

ARGUMENT

No substantial federal question is presented by the petition. A similar residence requirement has been sustained in *Suffling* v. *Bondurant*, 339 F. Supp. 257 (D.N. Mex., 1972), aff'd *sub nom. Rose* v. *Bondurant*, 409 U.S. 807 (1972) 34 L. Ed. 2d 312, 93 S. Ct. 460.

(1)

The constitutional questions presented by applicant have already been rejected by this Court in *Rose* v. *Bondurant*, cited in our pointhead (*supra*). The New Mexico

statute challenged in that case, like the statute here involved, required that an applicant for admission to the bar have been an "actual resident" of the State for "at least six months prior to admission". *In addition, it required that an applicant be "an actual bona fide resident of the state" at the time of examination.* The terms of the New Mexico statute are set forth at the outset of the majority memorandum opinion of the District Court in *Suffling* v. *Bondurant,* 339 F. Supp. 257, where the Court stated (at p. 258):

> "The Board of Bar Commissioners appointed by the Supreme Court of the State of New Mexico promulgates rules and regulations governing admission to the New Mexico State Bar. These are contained in Section 18-1-8 N.M.S.A. (1953 Comp.). Rule II, subd. A, par. 8 provides:
>
> 'An applicant for admission to the bar upon examination, except an attorney duly admitted to the bar in another state and actually engaged in the practice of law therein, must be an actual bona fide resident of the State of New Mexico at the time of examination. An applicant for admission to the bar, either upon examination or upon certificate and motion must be a citizen of the United States, an actual bona fide resident of the State of New Mexico for at least six months prior to admission, 21 years of age and of good moral character.'"

(2)

We note that the United States Court of Appeals in this case did not deem *Suffling* to have decided the constitutional issue presented by *Tang.* Judge MULLIGAN wrote (487 F.2d 138, at p. 140):

> "In *Suffling,* a three-judge court held that the New Mexico Supreme Court rule requiring six months' residence before admission to the bar did not violate

the equal protection clause or the constitutionally based right to travel. The court reasoned that six months was a reasonable period for providing the state an opportunity to examine the character and fitness of the applicant. The Supreme Court affirmed without opinion.

"The question in the instant case differs from *Suffling* because of the interpretation given to the New York statute by the New York courts, since the Appellate Division interpreted New York CPLR 9406(3) to require *permanent* residence not merely six months' residence. Thus, the New York requirement of actual residence as interpreted by the New York courts is substantially broader than that approved in *Suffling* and affirmed by the Supreme Court. The question remains whether the broader New York residence requirement had a 'rational connection with the applicant's fitness or capacity to practice law.' *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 239 (1957). We do not reach this issue."

Tang's constitutional claims were rejected by the federal Court of Appeals because they deemed them to have been raised and passed upon by the First Department and regarded Tang's federal suit to be an effort to have federal appellate review of a state court decision on a federal constitutional question. This reasoning is reflected in the portion of Judge Mulligan's opinion, where he wrote (p. 141):

"The appellant has conceded on oral argument that in his state proceeding, he raised the same federal constitutional issues which he now relies upon in the federal court in this action under 42 U.S.C. § 1983. See *Grubb* v. *Public Util. Comm'n,* 281 U.S. 470, 477-78 (1930). There is no question but that Tang could have appealed the three-two decision of the Appellate Division to the New York Court of Appeals on the merits (the interpretation to be given 'actual residence' in

New York CPLR 9406(3)) as well as on the federal constitutional questions. In the event that he was unsuccessful he would have been assured of a direct appeal to the United States Supreme Court. Tang however abandoned the state courts after the intermediate ruling of the Appellate Division and is now in effect seeking a review of the constitutional issues in a federal court. The district court lacks jurisdiction to review state court determinations of federal constitutional questions and on that ground we affirm the dismissal of the action. *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923)."

(3)

Although the Attorney General has succeeded in obtaining a dismissal of this federal suit instituted by *Tang*, we do not deem it inappropriate to indicate that the federal Court of Appeals seems to have underemphasized the fact that the statutory provision here questioned and the rule involved in the New Mexico case affirmed by the U.S. Supreme Court were *virtually identical*. This fact finds support in other portions of the District Court opinion in *Suffling* (*supra*). There the Court noted (339 F. Supp. 257, at p. 258):

"Rose passed the New Mexico bar examination in August, 1970. *He claims residence by reason of having lived in New Mexico as late as October, 1960, having gone to school at the University of New Mexico and by virtue of employment and enlistment in the Marine Corps here. He claims dual residency with California.* Prior to passing the New Mexico Bar examination, he attended school in California as a resident *and took and passed the California bar examination as a resident.* Rose resides in California and practices law in that state." (Italics supplied.)

The *Suffling* court stated (p. 259):

> "The question seems to turn on the length of time required to determine good character and to establish residence before admission and whether that length of time is reasonable.
>
> "While the regulations require that residence and good moral character be established before taking the bar examination, the Commissioners have allowed the residence period to start at any time before the bar examination with the balance to be filled out after the examination. Residence in New Mexico can start at any time from five months and 29 days before or on the day of the examination with the balance of time to be completed after the examination and good moral character can be established after the examination.
>
> "None of the cases in which residency requirements have been held unconstitutional deals with the requirements as liberal as those of New Mexico."

It distinguished carefully the cases in which less reasonable residency requirements had been rejected as unconstitutional. The Court wrote (p. 259):

> "Mississippi required *twelve months'* residency *prior to application* to take the examination and further required that a written application be filed at least ninety days before the time of examination. Residency in Mississippi was thus required for a total of *fifteen months.* Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971).
>
> "Georgia required establishment of good moral character *before taking the examination* and twelve months' residence after passing the examination prior to admission. Webster v. Wofford, supra. North Carolina required *twelve months'* residence *prior to taking the examination* and gave the examination only once each year. Keenan v. Board of Law Examiners

of State of North Carolina, 317 F. Supp. 1350 (E.D. N.C. 1970). In no case was less than *one year's* residence required and in *Keenan* the time could run as high as *two years.*" (Italics supplied.)

After further review of the curious Hawaiian requirement set forth in the *Potts* opinion, the Court set forth its conclusion (with reference to its "actual bona fide resident" requirement) as follows (p. 260):

"[2] We conclude that six months' residence in New Mexico to be commenced either any time before the bar examination or as late as the day of the bar examination is a reasonable period in which to afford the Board of Bar Examiners an opportunity to investigate the morals and character of those persons who seek to become members of the New Mexico bar. It also provides a realistic time period in which three members of the bar residing in the applicant's locality can certify regarding his moral character as required by Rule VI (38) of the Rules Governing Bar Examiners.

[3] Considered under the traditional test of reasonable classification which is the standard we hold applicable, the six-month residency requirement is reasonable and does not unduly penalize petitioners' right to interstate travel. While rejecting application of the stricter test of Equal Protection in this case, Lipman v. Van Zant, supra, 329 F. Supp. at page 403, we express the view that a state does have a compelling interest in the quality and integrity of the persons whom it licenses to practice law and may impose regulations which promote that interest.

"An order will be entered adjudging that the requirement of six months' residency in New Mexico for applicants seeking admission to the bar is constitutional."

(4)

We would hesitate to find any great distinction between the six month "actual bona fide resident" requirement of the New Mexico rules and the six month "actual resident" requirement of New York's CPLR 9406(3). Although the United States Court of Appeals chose in this case to find a distinction between a mere residence requirement and a "permanent" residence requirement, we would deem the purpose of both statutory proxisions to have been similar. Decisions upon the appeals pending before the New York Court of Appeals in *Matter of Behrle* and *Matter of Lotsof* may cast some further light upon the interpretation and purpose to be given to the New York statute by its highest Court.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, New York, March 12, 1974

Respectfully submitted,

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APPENDIX

Motion for Leave to Submit an Amicus Curiae Brief.

COURT OF APPEALS, STATE OF NEW YORK

In the Matter of the Application of

SANDRA GALE BEHRLE

For Admission to the Bar

COUNTY OF BERGEN,
STATE OF NEW JERSEY } ss.:

CLIFTON C. TANG, being duly sworn, deposes and says:

1. I am the excluded bar-applicant in *Application of Tang*, 39 App.Div.2d 357, 333 N.Y.S.2d 964 (1972).

2. I learned from the New York Law Journal, December 12, 1973 issue, that the decision appealed from was reached by the Appellate Division below "on constraint of" its decision in my application.

3. I move the court for leave to submit an amicus curiae brief for the purpose of calling this court's attention to certain questions of law, which arose out of *Application of Tang* and which have been presented to the United States Supreme Court in movant's petition for a writ of certiorari for its discretionary consideration. The petition was docketed on February 19, 1974.

4. In view of the subject matter before the court, I believe that public interest is best served by this court's prompt

consideration of all constraints, which arose out of *Application of Tang*, upon all bar-applicants and their families, present and future.

Respectfully submitted,

CLIFTON C. TANG
CLIFTON C. TANG,
228 East Clinton Avenue,
Tenafly, N. J. 07670

Sworn to before me this 28 day
of Feb., 1974.
CATHERINE C. MARSHALL
My Commission Expires

December 8, 1976

Supreme Court, U. S.
FILED
MAR 18 1974
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. 73-1278

CLIFTON C. TANG, Petitioner,

v.

APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, FIRST DEPARTMENT, and Honorable Justices ARON STEUER, OWEN McGIVERN, and LOUIS J. CAPOZZOLI, Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

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PETITIONER'S REPLY MEMORANDUM

CLIFTON C. TANG,
Petitioner pro se,
228 E. Clinton Avenue,
Tenafly, New Jersey

March 15, 1974

Respondents' Argument asserts that "no substantial federal question has been presented."

On the first of the three questions presented at page 3 of the Petition, for example, the court below has expressed the opinions that petitioner's Constitutional claims and arguments "may well be substantial" (App. 9d) and "are not insubstantial." (App. 15d)

On the second question (Jurisdiction of federal courts) and the third question (Conflict with this Court's decision), the Opposing Brief is barren of any reason why these questions are not substantial.

New York Judiciary Law Section 470 authorizes New York attorneys to reside in any State adjoining New York. New Mexico has no such law. In the New Mexico case of Suffling v. Bondurant, 339 F.Supp. 257, affirmed sub nom. Rose v. Bondurant, 409 U.S. 807, there were no questions raised and decided with respect to bar-applicants', and their spouses', (A) freedom to make their marital home in an adjoining State, and (B) freedom to remain permanent residents of an adjoining State. Therefore, this Court's summary affirmance of Rose does not dispose of the Constitutional questions attending the New York requirement here in issue. (Petition at pp. 14-15)

The court below has explicitly ruled (App. 4d) that:

> "Thus, the New York requirement of actual residence as interpreted by the New York courts is substantially broader than that approved in Suffling and affirmed by the Supreme Court. The question remains whether the broader New York residence requirement had a 'rational connection with the applicant's fitness or capacity to practice law.' Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957)."

The Opposing Brief, however, devotes 3 of its 9 pages arguing against the above ruling of the Second Circuit. It is beyond the permissible scope of this reply memorandum to deal with respondents' argument here. But, in order for this Court to review respondents' argument on the merits, respondents have added one more reason for this Court to grant a writ of certiorari to the court below.

Respectfully submitted,

March 15, 1974

Clifton C. Tang,
Petitioner pro se